

Small Business Notes

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U.S. Supreme Court: Discharging an Employee on the Basis of Homosexuality or Transgender Status is Unlawful

On June 15th the U.S. Supreme Court released its decision in three related cases where individuals claimed they had been fired from employment because of homosexuality or transgender status and that such discharge constituted unlawful discrimination under Title VII of the Civil Rights Act of 1964 that prohibits discrimination in employment based on sex. The cases are *Bostock v. Clayton County, GA.* (17-1618); *Altitude Express v. Zarda* (17-1623); *R.G. and G.R. Harris Funeral Homes v. EEOC* (18-107). The employers conceded that they had discharged the employees because of their homosexuality or transgender status but argued that such action was not in violation of Title VII.

Writing for the 6-3 majority, Justice Gorsuch wrote:

“Today we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear.

An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

The decision leaves employers with four important take-aways:

- It does not matter what an employer calls its discriminatory practice or the reasons offered for its implementation.
- Sex does not need to be the only or the primary cause of dismissal.
- An employer does not escape liability just because it treats male and female homosexuals the same.
- An employer cannot fall back on historical interpretations or policies.

Both the majority decision and the dissents by Justices Alito, Thomas, and Kavanaugh offer very detailed arguments and history of Title VII and its interpretation.

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Minnesota Supreme Court Retains “Severe or Pervasive” Test in Sexual Harassment Claims Under the Minnesota Human Rights Act But Notes It’s Evolving Nature

Under the Minnesota Human Rights Act sexual discrimination includes sexual harassment which the act defines as “unwelcome sexual advances...or communication of a sexual nature...when that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment...or creating an intimidating, hostile or offensive employment...environment.” Minn. Stat 363A.03 subd. 43(3).

Minnesota courts, however, also apply the standard derived from federal case law that discriminatory conduct, including sexual harassment, is not actionable unless it is so severe or pervasive as to alter the conditions of the complainant’s employment or create an abusive environment.

On June 3, 2020, the Minnesota Supreme Court handed down its decision in *ASSATA KENNEH v. HOMEWARD BOUND, INC.* [[A18-0174](#)] in which the plaintiff Kenneh sought relief under the Minnesota Human Rights Act for a continuing series of sexual comments and invitations directed to her at work. (see the [link](#) to the case for the number and kind of comments which are not appropriate for recording here). The district court gave summary judgment to the employers and the court of appeals affirmed.

In its decision, the district court found (reluctantly) that the alleged conduct did not meet the severe or pervasive test. Some of the conduct was “boorish and obnoxious” and some “both objectively and subjectively unacceptable,” but the court determined that the conduct “however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act.”

The Supreme Court reversed this section of the decision noting that the judgment as to whether conduct is severe or pervasive is a fact question for the jury and that a jury’s standard for assessing severity or pervasiveness is an evolving one and that many behaviors that were tolerated in the past as a normal part of workplace relations between individuals of opposite sexes are clearly not now tolerated. In short, the court reversed the award of summary judgment for employer on the basis that there was a sufficient question of fact for the jury to decide under changing and evolving standards of workplace behavior.

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Paycheck Protection Program Flexibility Act Becomes Law

On June 5, 2020, the President signed P.L.116-142, the Paycheck Protection Program Flexibility Act to provide loan recipients with greater flexibility on the term, uses of funds, and loan forgiveness for PPP loans made during the COVID-19 pandemic to enable businesses to keep workers employed in the face of business closings, supply chain disruptions, loss of markets and other adverse events associated with the pandemic.

The new law:

- Reduces the percentage of loan proceeds that must be spent on payroll from seventy five percent to forty percent;
- Extends to twenty four weeks, from eight weeks, the covered period for loan forgiveness and gives businesses that have received a loan earlier the option of continuing to use a covered period of eight weeks;
- Extends to December 31, 2020, the forgiveness eligibility deadline for spending PPP funds;
- For amounts of a loan not forgiven, provides for an extension of the loan term from two years to five years;
- Provides a safe harbor against cancellation of forgiveness for a business that has had to reduce its number of full time positions when the business can show it was unable to rehire former employees or find new position-qualified employees or can show that the reduction in number of employees was due federal COVID-19 guidance or regulations.
- Defers until receipt of a forgiveness decision the making of loan payments.
- Keeps the current deadline for applying for PPP loans at June 30, 2020.

Additional guidance or rulemaking, for both borrowers, and lenders can be expected soon.

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